UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

TRUST SAFE PAY, LLC,	:	
	:	
Plaintiff,	:	Civil Action No.:
	:	1:17-cv-10166 DPW
v.	:	
	:	
DYNAMIC DIET, LLC;	:	
KOSTAS VADOKLIS,	:	
VILMA VADOKLIS, and	:	
DOES 1-10, inclusive,	:	
	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

Now come the defendants and respectfully request this Honorable Court dismiss each count of the plaintiff's complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The defendants contend that dismissal is proper under Rule 12(b)(6) as: (1) Plaintiff has failed to provide a valid Copyright application or registration; (2) Plaintiff's websites are not accorded any copyright protection; and, (3) Plaintiff has failed to identify any alleged infringed material to support a claim under Copyright. Similarly, the Plaintiff's trade secret, fraud and M.G.L. c. 93A counts cannot survive Rule 12(b)(6) scrutiny.

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BACKGROUND

Plaintiff's First Amended Complaint ("P.C.") asserts claims for copyright, contributory and vicarious infringement, misappropriation of trade secrets under common law and M.G.L. c. 93, intentional fraud and violation of M.G.L. c. 93A.

Plaintiff's principals allege that they started a new business in 2009 for weight loss and created an algorithm in 2011 that they claim had a significant effect in generating substantially increased revenues and lowered costs. (P.C. ¶¶ 10 - 14). Plaintiff alleges that it took precautions to keep the algorithm secure by running its business out of the principals' house's locked basement using a password protected computer. (P.C. ¶ 16).

Further, Plaintiff alleges that its principals were good friends with Defendants and while on vacation in April of 2012, one of Defendant's principals volunteered to package and ship for the Plaintiff, for which she was paid, allegedly giving the Defendants access to the basement. (P.C. ¶¶ 17 - 21). Plaintiff alleges that the Defendants' plan subsequently involved them volunteering to babysit Plaintiffs' principals' children in order to have access to as much information as possible. (P.C. ¶¶ 23 - 29). Plaintiff then speculates that the defendant, Vilma, did "determine" the password to the plaintiff's computer. (P.C. ¶ 27).

In January of 2015, Plaintiff alleges it learned of the Defendants websites, due to Defendants bidding on similar words, and that it continued to monitor these websites alleging Defendants visited its website multiple times per day and made changes correlating to changes made by Plaintiff to its website. (P.C. ¶¶ 34 - 36).

ARGUMENT

I. STANDARD OF REVIEW

To survive dismissal, a complaint must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Adequate pleading "requires more than labels and conclusions" or "a formulaic recitation of a cause of action's elements." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although courts generally assume the truth of "well-pleaded factual allegations," the assumption does *not* apply to "legal conclusions . . . or 'naked assertion[s] devoid of further factual enhancement.'" *Elsevier Ltd. v. Chitika, Inc.*, 826 F. Supp. 2d 398, 405 (D. Mass. 2011) (quoting *Maldonado v. Fontanes,* 568 F.3d 263, 266 (1st Cir. 2009) (quoting *Iqbal,* 556 U.S. at 678)). "[L]egal conclusions . . . must be supported by factual allegations" to be credited. *Iqbal*, 556 U.S. at 679.

To avoid dismissal, a plaintiff must plead sufficient facts—once conclusory allegations are disregarded—to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "If the factual allegations in the complaint are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture, the complaint is open to dismissal." *SEC v. Tambone*, 597 F.3d 436, 442 (1st Cir. 2010) (citing *Twombly*, 550 U.S. at 555). Courts do not hesitate to dismiss copyright infringement suits on the pleadings when they suffer from fatal legal defects. *See, e.g.*, *Elsevier*, 826 F. Supp. 2d at 405; *Newborn v. Yahoo!, Inc.*, 391 F. Supp. 2d 181 (D.D.C. 2005).

II. PLAINTIFF'S COPYRIGHT INFRINGEMENT CLAIMS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

A. PLAINTIFF'S DIRECT COPYRIGHT INFRINGEMENT COUNT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

To state a claim for copyright infringement, a Plaintiff must allege "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Pubs., Inc., v. Rural Tel. Ser. Co., Inc.,* 499 U.S. 340, 361 (1991); *Johnson v. Gordon*, 409 F.3d 12, 18 (1st Cir. 2005). In order to find illicit copying, a plaintiff must first "prove that the defendant copied the plaintiff's copyrighted work either directly or through indirect evidence." *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 33 (1st Cir. 2001). "This showing entails proof that, as a factual matter, the defendant copied the plaintiff's copyrighted material." *Johnson v. Gordon*, 409 F.3d 12, 18 (1st Cir. 2005). Because "plagiarists rarely work in the open and direct proof of actual copying is seldom available," a plaintiff may prove factual copying by "adducing evidence that the alleged infringer enjoyed access to the copyrighted work and that a sufficient degree of similarity exists between the copyrighted work and the allegedly infringing work to give rise to an inference of actual copying." *Id.* The First Circuit has "termed the degree of similarity for purposes of indirectly adducing evidence of copying, 'probative similarity.'" *Soc'y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 49 (1st Cir. 2012) (quoting *Johnson v. Gordon*, 409 F.3d at 18). Probative similarity will be found if "the offending and copyrighted works are so similar that the court may infer that there was factual copying." *Lotus Dev. Corp. v. Borderland Int'l*, 49 F.3d 807, 813 (1st Cir. 1995).

The plaintiff must next establish substantial similarity by showing "that the copying of copyrighted material was so extensive that it rendered the offending and copyrighted works substantially similar." *Id.* In the First Circuit, the "ordinary observer" test is used to determine whether two works are substantially similar. *Gregory*, 689 F.3d at 50. "Under this rubric, two works will be deemed substantially similar if a reasonable ordinary observer, on examining both, 'would be disposed to overlook' the disparities between the works, 'and regard their aesthetic appeal as the same.'" *Id*. (quoting *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 607 (1st Cir. 1988)).

Importantly, for a plaintiff to succeed, the substantial similarity must relate to original elements of the copyrighted work. *See Id.* at 18-19 (citing *Feist*, 499 U.S. at 361). Thus, before examining the similarity between the works, "a court must engage in dissection of the copyrighted work by separating its original, protected expressive elements from those aspects that are not copyrightable." *Id*. Accordingly, "an overall impression of similarity may not be enough" if "such an impression flows from similarities as to elements that are not themselves copyrightable." *Id*. at 19. Among the elements that must be dissected out are ideas and concepts which are not protected by copyright law. 17 U.S.C. § 102(b). Common phrases or scene a faire, meaning "stock scenes or elements that necessarily flow from a common idea," protected. *CMM Cable Rep, Inc. v. Ocean Coast Props, Inc*., 97 F.3d 1504, 1522 n.25 (1st Cir. 1996); *Johnson*, 409 F.3d at 24. It is the plaintiff's burden to show substantial similarity and if he "fail[s] to allege facts supporting a 'reasonable inference' that the two works showed substantial similarity" then his claim fails as a matter of law. *Greenspan v. Random House, Inc.*, 2012 WL 5188792, at *1 (1st Cir. 2012).

1. **Plaintiff has failed to illustrate ownership of or produce a valid copyright application or registration for the alleged works.**

To state a claim under Copyright Law, Plaintiff must show that the Copyright Office (the "Office") received a valid application, or subsequently issued a valid registration, for each work allegedly infringed. *Feldman v. Twentieth Century Fox Film Corp.*, 723 F. Supp. 2d. 357, 364 (D. Mass. 2010); *see also* 17 U.S.C. § 411(a) ("[N]o civil action for infringement of a copyright in any

United States work shall be instituted until pre-registration or registration of the copyright claim has been made in accordance with this title."). Plaintiff purports to be the assignee of three Copyright applications as referenced by the following application numbers 1-3998164856; 1-3998164250; and 1-4018230311, (collectively the "Applications"). (P.C. ¶41). Curiously, despite sole reliance on the Applications as a basis for their claim, and three opportunities to do so, Plaintiff has failed to provide a copy of the applications, the alleged assignments or a copy of the works of visual art of each application with their original complaint, original opposition, or this First Amended Complaint.

Moreover, the Complaint is devoid of any exhibits substantiating any of the allegations asserted. Instead, the Complaint is rife with vague and conclusory language with no supporting evidence and thus fails to afford Defendants any opportunity to scrutinize whether the Applications are valid. The singular reference to the Applications in the Complaint states that the Applications "include various web-pages of Plaintiff's websites". (P.C. ¶41). As illustrated herein, mere reliance on application numbers, sans supportive evidence, constitutes failure to state a claim as the existence of application numbers does not render the applications "valid." Application numbers at most indicate that an application has allegedly been submitted to the Office and provide no proof of a valid copyright. Thus, Plaintiff has failed to satisfy the first prong to state a claim under Copyright Law, in that Plaintiff has failed to demonstrated submission of a valid application to the Office as there is no evidence in the record. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1247 (2010) (explaining that the Copyright Act's registration requirement is a precondition to filing a claim); *Feldman*, 723 F. Supp. 2d at 364 ("plaintiff's unregistered work cannot form the basis of her infringement claim."). Furthermore, Plaintiff readily admits that Plaintiff has not received any registrations to date from the Office.

The Plaintiff has now had three separate occasions, namely the original Complaint, Plaintiff's Opposition to Defendant's Motion to Dismiss (filed in the United States District Court, Central District of California) and now the F.A.C. to provide the Court with any evidence to substantiate their Copyright claims, yet again have failed to provide any documents. Plaintiff has never provided this Court or the Defendant's with a copy of their applications submitted to the Copyright Office, a copy of the material deposited with the Copyright Office for which they are seeking registration and documents that exhibit chain of title and ownership of the applications alleged herein.

2. In relying on uncorroborated copyright application numbers, in conjunction with a website, Plaintiff has failed to demonstrate copying of constituent elements of works that are original.

Although items appearing on the internet may be subject to copyright protection, a "website" alone is not protected by copyright. *See* Copyright Office Circular 66.[1] Circular 66 describes elements of an online work that do not afford Copyright protection including "website", "layout", and "look of website." *Id.*; *see also Darden v. Peters,* 402 F. Supp. 2d 638 (E.D.N.C. 2005) *affirmed* 488 F.3d 277 ("protection for overall format of a web page is inconsistent with copyrightability").

As addressed earlier, Plaintiff has failed to provide a copy of each application relied upon to bring a claim under copyright. Instead, Plaintiff chooses to rely on the conclusory statement: "the applications for copyright registrations in works of visual art, which includes web-pages of Plaintiffs," (P.C. ¶41).

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[1] *Pollstar v. Gigmania, Ltd.,* 170 F. Supp. 2d 974, 979 (E.D. Cal. 2000) (Court may take Judicial Notice of Copyright Office Circular 66 – "Copyright Registration for Online Works"). Circular 66, available at www.copyright.gov/circs/circ66.pdf

Once again, Plaintiff has failed to incorporate the web address or to attach the actual websites or web-pages allegedly owned by Plaintiff that correspond to the Applications and has thus failed to provide any matter to support the count of copyright infringement. Moreover, any effort to protect the "look and feel" of Plaintiff's website is outside the parameters of copyrightable subject matter.[2] Absent a specific indication of the protectable elements "substantially similar" to elements of Plaintiff's website, Defendants are rendered unable to discern what is allegedly being infringed.

Finally, contrary to the tenets of copyright law, Plaintiff admits that its website changes periodically, stating "Defendants' websites would be changed in the exact ways Plaintiff would change its website". (P.C. ¶35). Here, in addition to mischaracterizing the actions of the parties, Plaintiff has defeated the cause for copyright as the Copyright Office specifically precludes protection where a website has changed. *See* Circular 66 (revisions and updates to registerable website content must be registered individually). The Plaintiff has alleged no such individual registrations. Thus, even if Plaintiff was entitled to copyright protection, Plaintiff would be restricted to the version of the website as it appeared on the pending date of the submitted applications.

3. **Plaintiff has failed to identify which portions of copyrighted work are allegedly infringed and which material infringes.**

Plaintiff has failed to identify the constituent elements of the works that are original and has also failed to illustrate copying by failing to identify which portions or works of Defendants' website are infringing. To survive a motion to dismiss, Plaintiff must plead, *inter alia*, which

[2] *See* Copyright Office Circular 66, identifying unregisterable elements or descriptions, including "website," "interface," "format," "layout," "design," "look of website," "lettering," "game," or "concept."

particular work is the subject of a copyright claim and how, when and by what acts the work was infringed. In support of the Copyright Claim, Plaintiff merely plead that there are copyrightable elements of their website, stated as the "Art" with no supporting facts or exhibits and alluded to Defendants' website as infringing on the copyrightable elements of Plaintiff's website. (P.C. ¶¶43-45). Such vague allegations of infringement do not meet the required standard of particularity as Plaintiff has failed to identify the actual works on the website that are infringing or the works located on Defendants' website that allegedly infringe. There is neither mention of the specific elements Plaintiff is seeking to protect, nor any exhibits portraying the applications or the contents. Such conclusory pleadings cannot survive a motion to dismiss.

4. Plaintiff failed to illustrate Defendants' access to the alleged copyrightable works, the probative and substantial similarity of the copyrightable works, and the alleged infringing works.

Plaintiff has failed to illustrate if, when or how the Defendants' had access to the potentially copyrighted works. Speculation regarding a computer behind a locked door and the speculation of guessing a computer password cannot suffice.

Furthermore, Plaintiff cannot state a claim for copyright infringement without showing probative and substantial similarity. *Lotus Dev. Corp. v. Borderland Int'l*, 49 F.3d 807, 813 (1st Cir. 1995). Plaintiff has failed to identify their own website or the defendants' websites, much less make any comparison between them or the alleged protectable material and the alleged infringing material. Plaintiff has simply alleged that Defendants copied their work, stating, "Defendants have copied the original expressions contained in the Art without permission and used them on their websites…." (P.C. ¶42). Furthermore, Plaintiff alleged: "…Defendants used the original expressions contained in the Art with the pre-existing knowledge that such original expression was owned by Plaintiff." (PC. ¶43). As the plaintiff has only proffered wholly uncorroborated assertions, it has failed to meet the standard required to bring a copyright infringement claim.

B. THE COMPLAINT FAILS TO ALLEGE FACTS ESSENTIAL TO A CLAIM FOR COPYRIGHT INFRINGEMENT UNDER EITHER THEORY OF SECONDARY LIABILITY

For the same reasons set forth above with respect to Plaintiff's Direct Copyright Infringement Claim, Plaintiff is also unable to set forth a prima facie case for either Contributory Copyright Infringement or Vicarious Copyright Infringement. Plaintiff's claims fail in a post-*Twombly* world for the same reason as the Direct Infringement Claim – because each merely recites the elements for Contributory Infringement and Vicarious Infringement. Without more, these claims cannot survive a motion to dismiss.

1. The Complaint fails to identify any conduct by Defendants that plausibly supports a claim for secondary liability

The Complaint fails to allege any specific conduct by a third party that constitutes direct infringement, any facts that link any act of infringement to any specific third party responsible for infringement, or any facts that would make any of the purported secondary liability claims even remotely plausible.

a. Plaintiff failed to allege particular acts of infringement of copyrighted works for which any defendant may be liable.

As Plaintiff has failed to allege with particularity any acts of infringement, much less which entity performed these acts of infringement, the count for secondary copyright liability is improperly plead. Plaintiff must plead, *inter alia*, which particular work is the subject of a copyright claim and how, when and by what acts the work was infringed. *Four Navy Seals v. Associated Press* 413 F. Supp. 2d 1136, 1148 (S.D. Cal. 2005), (complaint pleaded insufficient facts where it did "not identify exactly which works Defendants infringed"). Third, as Plaintiff alleges infringement by multiple Defendants, the complaint must "allege specific acts of infringement by each defendant." *Taylor v. IBM,* No. 02-10391, 2002 WL 31845220, at *1, 54 F. App'x 794, (5th Cir. Dec. 12, 2002).[3] Fourth, as Plaintiff alleges that Defendants are secondarily liable, they must allege underlying direct infringement for which particular Defendants are liable. *See, e.g.*, *Greenspan*, 859 F. Supp. 2d at 219; *Resnick v. Copyright Clearance Ctr., Inc.*, 422 F. Supp. 2d 252, 258 (D. Mass. 2006).

b. Plaintiff fails to state a claim for contributory infringement

The Complaint lacks specific allegations of direct and contributory infringement that are necessary for a contributory infringement claim. A defendant is liable for contributory infringement when it "'intentionally induc[es] or encourage[es] direct infringement.'" *Elsevier Ltd. v. Chitika, Inc.*, 826 F.Supp.2d 398, 404 (D.Mass. 2011) (quoting *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, Ltd., 545 U.S. 913, 930 (2005)); see also *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) ("one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer"). A defendant need only know or have reason to know of the infringing conduct in order to be liable for contributory infringement, despite the defendant's noninfringing actions. *Gershwin*, 443 F.2d at 1162. Accordingly, "'the defendant need only have known of the direct infringer's activities, and need not have reached the legal conclusion that those activities infringed a copyrighted work.'" *Elsevier Ltd. v. Chitika, Inc.*, 826

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[3] *See also Home Design Servs., Inc. v. David Weekley Homes*, LLC, No. 06- 350, 2007 WL 1080001, at *3, 2007 Copr. L. Dec. (CCH) ¶29,356 (M.D. Fla. Apr. 9, 2007) (granting defendants' motion to dismiss where "[t]the First Amended Complaint ma[de] no distinction between the conduct of the thirteen defendants" and "fail[ed] to notify each individual defendant of the actions that led to their joinder to the litigation").

F.Supp.2d at 404 (quoting *Jalbert v. Grautski*, 554 F.Supp.2d 57, 68 (D.Mass. 2008)) (internal quotation marks omitted).

A defendant is not liable for contributory infringement unless it "induces, causes or materially contributes to the infringing conduct of another." *Gershwin*, 443 F.2d at 1162. Furthermore, a defendant's actions must exceed mere passivity. "Something more—deriving from one's substantial involvement—is needed*." Demetriades v. Kaufmann*, 690 F.Supp. 289, 293 (S.D.N.Y. 1988); see also *Gershwin*, 443 F.2d at 1163 (liability found due to "pervasive participation" of a contributory infringer). Courts limit contributory infringement "liability to instances of more acute fault than the mere understanding that some of one's products will be misused." *Grokster*, 545 U.S. at 932-33.

Plaintiff has failed to specify any direct infringement as required for a claim of secondary infringement. Plaintiff has also failed to identify who is allegedly the direct infringer. Therefore absent a third party and any facts linking the third party to direct infringement, a claim of secondary infringement is not even plausible.

In addition to these requirements, the Digital Millennium Copyright Act (DMCA) requires notice to be given to the alleged Contributory Infringer. No such notice has been given here. The DCMA takedown notice requires the producer to provide "[i]dentification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material" 17 U.S.C. § 512(c)(3).

Plaintiff has also failed to present any facts or allegations that are sufficient for a contributory infringement claim. Plaintiff only makes conclusory accusations that Defendants had reason to know that they were infringing Plaintiffs original expression and Defendants induced the infringing activity by supplying the resources for and directing the infringing activities of Defendants.”. (P.C. ¶¶51, 52). At no point does Plaintiff specify who they are claiming the secondary infringers are, nor do they specify how the Defendants might have known of the allegedly infringing activity or how they had control over the allegedly infringing activity. The Plaintiff merely recites the elements for a claim of contributory infringement. Due to a lack of specificity and clarity throughout this claim, in addition to failing to outline the necessary elements, Plaintiff has failed to state a claim for contributory infringement.

c. Plaintiff fails to state a claim for vicarious infringement

One “infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.” *Grokster*, 545 U.S. at 930; see also *Demetriades v. Kaufmann*, 630 F.Supp. at 292 (“‘[W]hen the right and ability to supervise the infringer coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials,’ a third party may be held liable for the direct infringement of another.”) (quoting *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963)); accord *Rosenthal v. E. MPC Computers, LLC*, 493 F.Supp.2d 182, 188-189 (D.Mass. 2007) (“although the First Circuit itself has never discussed vicarious copyright infringement, at least two judges in this district have . . . adopted from the Second Circuit” standards for vicarious liability). “The essential aspect of the direct financial benefit inquiry is whether there is a causal relationship between the infringing activity and any financial benefit a defendant reaps, regardless of how substantial the benefit is in proportion to a defendant’s overall profits.” *Agence France Presse v. Morel,* 2013 WL 2253965, *21 (S.D.N.Y. Jan. 14, 2013) (quoting *Ellison v. Robertson*, 357 F.3d 1072, 1097 (9th Cir. 2004)).

Plaintiff has failed to meet these requirements, as again, Plaintiff simply restates the elements required to bring a claim of vicarious infringement, stating Defendants, controlled the infringing activities by way of Defendant's principal's and that Defendants have obtained profits directly they would not otherwise have realized but for the infringing activities." (P.C. ¶¶57 - 59). Plaintiff failed to point to even one specific example of control or profits as required for vicarious infringement, and instead only concludes that Defendants had control and gained profits from the infringement. This, in addition to Plaintiff's failure to identify its copyrights, the alleged infringed material, or the alleged infringing material, leads to the conclusion that the Plaintiff's claims cannot survive a motion to dismiss.

III. PLAINTIFFS FAIL TO STATE A CLAIM FOR TRADE SECRET MISAPPROPRIATION

A. PLAINTIFF FAILED TO SUBSTANTIATE A VALID TRADE SECRET FOR THE ALLEGED MISAPPROPRIATION.

Under Massachusetts law, a trade secret is a 1) "secret," that is 2) "used in one's business," and that 3) "gives [the owner] an opportunity to obtain an advantage over competitors who do not know or use" the secret. *J.T. Healy & Son, Inc. v. James A. Murphy & Son, Inc.*, 357 Mass. 728, 736 (1970) (quoting RESTATEMENT TORTS § 757 comment (b)). "A trade secret may consist of any formula, pattern, device or compilation of information … [including] a list of customers." *Id.* Plaintiff failed to offer any facts to support a conclusion that their algorithm meets the standard for trade secret.

"The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret." *Healy*, 357 Mass. at 736 (quoting RESTATEMENT; TORTS § 757 comment (b)). Whether or not a given set of business information is secret "depends on the conduct of the parties and the nature of the information" rather than on any hard and fast rule. *Jet Spray Cooler, Inc. v. Crampton*, 361 Mass. 835, 840 (1972). There are six factors of relevant inquiry: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and to his competitors; (5) the amount of effort or money expended by the employer in developing the information; and, (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Id.*

Thus, the standard for secrecy requires that the information must not be generally known by or readily ascertainable to competitors. Plaintiff failed to provide evidence to illustrate the secret nature of the algorithm, failed to show that the algorithm is not available to the public and failed to define "algorithm" as it pertains to their website. Thus, the secret nature of the "algorithm" is conclusory at best. Moreover, the Plaintiff's alleges that the Defendants utilized *similar* words to those of the plaintiff, with no showing that these similar words are not known generally in the industry.

The trade secret must also give its owner an economic advantage over its competitors. To determine this, courts look at a number of factors: (a) the value the information has to the owner and its competitors; (b) how much effort or money the owner put into developing the information; (c) how seriously the owner tried to keep the information secret; (d) how hard it would be for others to properly acquire or duplicate the information; and (e) the degree to which other people have placed this information in the public domain. *Restatement of Torts §757*. Plaintiff failed to address any of the five factors delineated for economic advantage and failed to provide any evidence explaining how the algorithm conveys a competitive advantage to their business over their competitors. Plaintiff merely regurgitated the elements for trade secret protection under stating, "Plaintiff[s]' algorithm is a secret and confidential electronically stored process, formula, design, technical information, scientific information, proprietary information not known to other businesses in the Plaintiff's industry that provides Plaintiff with a competitive advantage over others who do not know the algorithm," (P.C. ¶63) and "[u]sing the deception of wanting to babysit, a position of trust to only do what was necessary to babysit, Defendants took the algorithm without permission in order to benefit from it and to the detriment of Plaintiff." (P.C. ¶65). Plaintiffs have once again fallen short of the pleading standard.

Finally, the owner of a trade secret must make reasonable efforts to keep the information secret. To determine whether a company took reasonable steps to protect its trade secrets, courts consider "1) the existence or absence of a [confidentiality agreement], 2) the nature and extent of precautions taken, 3) the circumstances under which the information was disclosed and 4) the degree to which the information has been placed in the public domain or rendered readily ascertainable." *TouchPoint Solutions, Inc. v. Eastman Kodak Co*., 345 F. Supp. 2d 23, 29 (D. Mass. 2004). "[T]he standard is reasonableness, not perfection," a company need not take "heroic measures" to preserve the confidentiality of its trade secrets. *USM Corp. v. Marson Fastener Corp.*, 379 Mass 90, 101 (1979). Here Plaintiff failed to demonstrate appropriate steps taken to protect their algorithm stating: "Plaintiff has kept the algorithms a secret from the public by locking it in a password-protected system in a room that is locked from the public." (P.C. ¶64). Plaintiffs claim to have special business and computer skills yet they claim the defendants, with no special computer skills, were able to figure out their password to their computer with minimal effort. Plaintiffs hardly took proper action to protect the alleged trade secret by keeping it on a computer with one password. A password to a computer is a general basic function of the computer itself and not a unique, intentional protection taken by the Plaintiffs. Furthermore, Plaintiffs also fail to make any argument that the minimal actions taken in securing their algorithm are proportionate to the value of the algorithm itself, and thus have failed to substantiate a valid trade secret.

Under Massachusetts law, a plaintiff must establish three elements to demonstrate tortious misappropriation of a trade secret: 1) the information at issue must constitute a trade secret, 2) the plaintiff must have taken reasonable steps to secure the confidentiality of the trade secret, and 3) the defendant must have used improper means to obtain the trade secret. *Sutra, Inc. v. Iceland Express*, 2008 WL 2705580, at *3 (D. Mass. July 10, 2008). Plaintiff's statements in support of misappropriation are merely speculation without any supporting evidence. Plaintiff has failed to provide evidence showing the algorithm is a trade secret, that it took reasonable steps to secure the algorithm's confidentiality, or that the defendants used improper means to obtain it. Plaintiff has failed to state a claim for misappropriation both under the common law and under the M.G.L. c. 93.

IV. PLAINTIFF'S INTENTIONAL FRAUD COUNT SHOULD BE DISMISSED FOR LACK OF REQUISITE SPECIFICITY OF PLEADING

"A claim for damages from deceit requires proof that: (1) the defendant made a misrepresentation of fact; (2) it was made with the intention to induce another to act upon it; (3) it was made with the knowledge of its untruth; (4) it was intended that it be acted upon, and that it was in fact acted upon; and, (5) damage resulted directly therefrom. *Equipment & Syst. for Ind'y, Inc. v. Northmeadows Constr. Co., Inc.,* 59 Mass.App.Ct. 931 (2003). "At a minimum, a plaintiff … must particularize the identity of the person(s) making the representation, the contents of the misrepresentation, and where or when it took place." *Id.* "In addition, the plaintiff should specify the materiality of the misrepresentation, its reliance thereon, and resulting harm." *Id.*

Fed.R.Civ.P. 9(b) provides that allegations of fraud must meet a heightened pleading standard. "In alleging fraud … a party must state with particularity the circumstances constituting fraud … by an averment of the who, what, where, and when of the allegedly … fraudulent representation." *Fraser v. Prudential Ins. Agency, LLC*, 2014 WL 10936589, pg. 3 (USDC, D.Mass. 2014) (Attached hereto). "The other elements of fraud, e.g., 'malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id.* "Nevertheless, the complaint must identify the basis for inferring scienter." *Id.* (internal citation omitted). "The Courts have uniformly held inadequate a complaint's general averment of the defendants knowledge of material falsity, unless the complaint sets forth specific facts that make it reasonable to believe that defendant knew that a statement was materially false or misleading." *Id.* (internal citations omitted).

A. PLAINTIFF FAILED TO MEET THE SPECIFICITY REQUIREMENT FOR SHOWING WHEN AND WHERE THE MISREPRESENTATION WAS TENDERED.

Plaintiff's allegations of fraud fail to reach the required specificity as to when and where the fraudulent representations were tendered. Plaintiff alleges that Defendants' principals concocted a plan in April of 2012 through an offer to babysit Plaintiff's principal's children, as a ruse to gain access to Plaintiff's principals' computer. (P.C. ¶¶23, 26). However, no unauthorized access to the computer was shown. Plaintiff alleges that one of Defendant's principals spoke with one of Plaintiff's principals between April 2012 and January 2013 about starting an online e-cigarette business. (P.C. ¶28). Plaintiff's contentions regarding when the representations were tendered are insufficient to survive a motion to dismiss, as Plaintiff only provides two general time periods, April 2012 and, between April 2012 and January 2013; there is no indication as to the number, dates, times or place of the communications. These vague allegations of 'when' do not comply with the necessary specificity. The plaintiff completely fails to allege *any* facts as to where these communications took place therefor the Plaintiff's fraud clams should be dismissed.

B. THE PLAINTIFF'S PLEADINGS LACK SPECIFICITY REGARDING THE ELEMENTS OF KNOWLEDGE OF FALSITY AND INTENT TO INDUCE RELIANCE

Plaintiff alleges that "Defendants knew such representations were false when he made them because Defendants never started an electronic cigarette internet-based business and Defendants have not been around or cared about children since." (P.C. ¶ 71). Again, Plaintiff has pleaded only conclusory language with no facts so as to comply with the requisite specificity of pleading of fraud claims. Moreover, the plaintiff's claim relies on the speculation that the babysitting led to the defendants breaking into a computer and stealing the plaintiff's trade secrets. As there are no facts alleged supporting this speculation, the plaintiff's complaint must be dismissed.

C. THE PLAINTIFF'S PLEADINGS LACK THE REQUISITE SPECIFICITY REGARDING THE ELEMENT OF RELIANCE AND RESULTING DAMAGE

"A plaintiff asserting fraud by misrepresentation is obliged to establish a complete causal relationship between the alleged misrepresentations and the harm claimed to have resulted therefrom." *Id.* "This requires a plaintiff to allege specific facts not only showing he or she actually and justifiably relied on the defendant's misrepresentations, but also how the actions he or she took in reliance on the defendant's misrepresentations caused the alleged damages." *Id.*

Plaintiff's Complaint fails to allege any facts as to Plaintiff's reliance on Defendants alleged misrepresentations. It only alleges that "Plaintiff so reasonably relied" and without any factual allegations as to what the Plaintiff or its principals *did* in reliance on Defendants' alleged actions. (P.C. ¶75). Therefore, the Plaintiff's complaint fails to meet the specificity of pleading on reliance. *Orcilla v. Big Sur, Inc.*, 244 Cal.App.4th 982 (2016). Likewise, the Plaintiff pleads no facts on how any reliance caused the alleged damages, failing to meet the specificity standard.

V. THE PLAINTIFF'S M.G.L. c.93A CLAIM MUST BE DISMISSED

The plaintiff's c. 93A claim must be dismissed as it is predicated upon the same set of conclusory allegations as the other counts in the plaintiff's complaint. Therefore, for the reasons outlined above, the plaintiff's claim for violation of M.G.L. c. 93A must be dismissed.

VI. CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that this Court dismiss Plaintiff's Complaint in its entirety.

Defendants,
Dynamic Diet, LLC, Kostas Vadoklis, and
Vilma Vadoklis,
By their attorneys,

/s/ Douglas F. Hartman

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CERTIFICATE OF SERVICE

I, Douglas F. Hartman, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this 19th day of May, 2017.

/s/ Douglas F. Hartman
Douglas F. Hartman